



THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

**JOHN L. HILL
ATTORNEY GENERAL**

April 18, 1973

The Honorable Dolph Briscoe
Governor of the State of Texas
Austin, Texas

Letter Advisory No. 12

Re: The constitutionality of Senate
Bill 373, allowing the Texas
Dept. of Corrections to grant
temporary furloughs to inmates
to attend to medical treatment
or to attend to family emergencies.

Dear Governor Briscoe:

You have requested an opinion regarding the constitutionality of Senate Bill 373 which has passed both Houses of the Legislature and is before you for signature. It would allow prison officials to grant temporary furloughs to inmates for medical reasons and for family emergencies, as an alternative to the presently established procedures requiring approval of the Board of Pardons and Paroles and the Governor, procedures so cumbersome that at times they have defeated the very purpose of the emergency reprieve.

Section 1 of the Bill would amend Article 42.12, Texas Code of Criminal Procedure, the Adult Probation and Parole Law, to exclude temporary furloughs from its coverage.

"Section 36. The provisions of this Act shall not apply to temporary furloughs granted by the Texas Department of Corrections for the purpose of obtaining medical treatment, diagnosis or medical study or for the purpose of attending to family emergencies."

Section 2 of the Bill would add an Article (6184M) to the Civil Statutes, reading:

"Article 6184M. Temporary furloughs for illness and family emergencies.

"Section 1. The Texas Department of Corrections is authorized to grant temporary furloughs of not more than 30 days to any inmate serving a term of imprisonment in the department for the purpose of obtaining medical treatment, diagnosis or medical study and such furloughs shall be known as medical furloughs. The Texas Department of Corrections is further authorized to grant temporary furloughs of not more than 10 days to inmates who are considered by said department acceptable security risks to attend to family emergency needs and in no event shall more than two such furloughs be granted during a calendar year period without the authority of the Texas Board of Pardons and Paroles and the governor as in the case of reprieves.

"Section 2. The department may extend a medical furlough only granted under this Act in increments of up to 30 days when the circumstances justify a longer furlough, but in no event may the department permit an inmate to remain on furlough under this Act for more than 90 days during a calendar year period without the authority of the Texas Board of Pardons and Paroles and the governor as in the case of reprieves.

"Section 3. The department shall promulgate rules in the same manner as other rules for the government and operation of the department are promulgated to govern the administration and conditions of temporary furloughs."

Your specific question is "Can the legislature grant to the Texas Department of Corrections the power to grant these furloughs without the approval of the Board of Pardons and Paroles and the Governor?"

The responsibilities of the Governor and the Board are contained in Article 4, § 11 of the Texas Constitution which reads in pertinent part:

" . . .

"In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, on the written signed recommendation and advice of the Board

of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and pardons; and under such rules as the Legislature may prescribe, and upon the written recommendation and advice of a majority of the Board of Pardons and Paroles, he shall have the power to grant one reprieve in any capital case for a period not to exceed thirty (30) days; and he shall have power to revoke paroles and conditional pardons. With the advice and consent of the Legislature, he may grant reprieves, commutations of punishment and pardons in cases of treason.

"The Legislature shall have power to regulate procedure before the Board of Pardons and Paroles and shall require it to keep record of its actions and the reasons therefor, and shall have authority to enact parole laws."

Cases have held that the Board and the Governor also have jurisdiction of paroles, which are described as conditional pardons.

The question, then, is whether the "furlough" of Senate Bill 373 is a reprieve, a commutation of punishment, a pardon, or a parole over which the Governor and the Board of Pardons and Paroles have been given exclusive jurisdiction by our Constitution, or, on the other hand, whether it is something different over which the Department of Corrections may be given jurisdiction as the Legislature intended.

The characteristics of reprieves, commutations, pardons and paroles are that they directly affect the running of the sentence. The reprieve either postpones it, or in rare cases, may interrupt it. The commutation changes the punishment assessed to a lesser one. Pardon exempts the person from serving the punishment. Parole, a conditional pardon, exempts him from serving the punishment subject to certain conditions. In none of these situations is the person an actual prisoner under the custody and/or control of the Board of Corrections. In all of them, the person may live as an ordinary member of society without being subject to strict custodial and security measures, so long as he meets the conditions of his release.

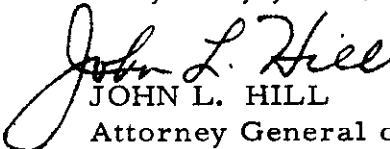
As we understand and interpret Senate Bill 373, these conditions would not be true of the furlough contemplated by it. The length of the prisoner's sentence is not affected by the furlough. As with work furloughs, which have been in effect since 1969, the sentence continues to run. The prisoner remains an actual prisoner, subject to all the rules and regulations of the Board of Corrections and subject, at all times, to its security requirements. He may not return to civilian life. The furloughs contemplated by this bill are for very restricted purposes and can be granted, if at all, only subject to precise rules and regulations to be laid down by those responsible for the continued custody of the prisoner. As soon as the family emergency ends or he no longer needs the medical care, he must return to prison. In the case of a family emergency, he must first qualify as an acceptable security risk.

The Department of Corrections is required to promulgate rules to carry into effect the intent of the Legislature, i. e., that the "furlough" contemplated by the Bill be under such circumstances that the prisoner will remain a prisoner and that the furlough will not have the characteristics of a commutation, a reprieve, a pardon, or a parole. We must assume that the Department of Corrections will obey this mandate and adopt rules and regulations requiring such security measures in all cases as the man and the situation indicate so that the furlough will not infringe on the exclusive jurisdiction of the Board of Pardons and Paroles and of the Governor.

With these factors in mind and relying on such security and custody precautions being implicit in the contemplated furloughs, it is our opinion that the Bill does not intrude upon the prerogatives of the Governor and the Board of Pardons and Paroles to pass upon a prisoner's right to actual reprieve, commutation, pardon or parole.

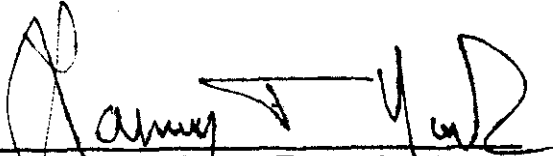
Ex parte LeFors, 303 S. W. 2d 394 (Tex. Crim. 1957); Snodgrass v. State, 150 S. W. 162 (Tex. Crim. 1912); Ex parte Redwine, 236 S. W. 96 (Tex. Crim. 1922); Railroad Commission v. Shell Oil Co., Inc., 161 S. W. 2d 1022 (Tex. 1942); Railroad Commission v. Shell Oil Co., Inc., 206 S. W. 2d 235 (Tex. 1947); Rubin, Law of Criminal Correction (1963), §17 Furloughs, p.299; 36 Federal Probation No.1, p. 38 (March, 1972).

Very truly yours,


JOHN L. HILL

Attorney General of Texas

APPROVED:


LARRY F. YORK, First Assistant


DAVID M. KENDALL, Chairman
Opinion Committee